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80-1266

No.

IN THE

Supreme Court of the United States

ROBERT WHEELER WELCH,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a vessel, tied to a dock on the Intercoastal Waterway without a nexus to the border, is subject to a warrantless boarding by a United States Customs Officer who is possessed only with a reasonable suspicion of criminal activity for the expressed purpose of searching for contraband.

LIST OF PARTIES

The Defendants in the District Court and Appellants in the Court of Appeals, Fifth Circuit were: AUVERGNE D'ANTIGNAC, a/k/a Jack D'Antignac; PATRICK GLEN KNIGHT; THOMAS OLDEN THORNTON; TIMOTHY DAVID CAHILL; and ROBERT WHEELER WELCH.

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OPINIONS BELOW

The opinion and judgment of the United States Court of Appeals for the Fifth Circuit sought to be reviewed is reproduced in Appendix A and is not yet officially reported. Two earlier opinions were issued but withdrawn on rehearings. (See Appendix B)

JURISDICTION OF THE SUPREME COURT

The United States Court of Appeals for the Fifth Circuit issued three different opinions in this case. The first one was issued on May 2, 1980, and was withdrawn on rehearing on August 15, 1980. (Appendix B) The second opinion issued on August 15, 1980, and was withdrawn on rehearing on October 20, 1980. (Appendix B) The third opinion issued on October 20, 1980, and the court adhered to it upon denial of a Motion for Rehearing with Suggestion for Rehearing En Banc on December 11, 1980, making it

the judgment sought to be reviewed in this Court. (Appendix A) Title 28, United States Code, § 1254 and Rule 17 of the United States Supreme Court Rules confer certiorari jurisdiction on this Court to review the judgment in question.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Fourth Amendment, United States Constitution:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Title 19, Section 1581(a), United States Code:

Any officer of the customs may at any time go on board of any vessel or vehicle at any place in the United States or within the customs waters or, as he may be authorized, a customs-enforcement area established under the Anti-Smuggling Act, or at any other authorized place, without as well as within his district, and examine the manifest and other documents and papers and examine, inspect, and search the vessel or vehicle and every part therefore and any person, trunk, package, or cargo on board, and to this end may hail and stop such vessel or vehicle, and use all necessary force to compel compliance.

STATEMENT OF THE CASE

The Petitioner was arrested on June 10, 1978, while in the company of D'Antignac and Knight, riding in a Ford Econoline van approximately one-quarter of a mile from the King Shrimp Docks in McIntosh County, Georgia.

(S.H., pp. 26-30).[1] Just prior to Petitioner's arrest, a shrimp boat, the "Little Hornet", had been boarded and searched at the King Shrimp Docks by the same U.S. Customs Officer who arrested Petitioner. During the search of the "Little Hornet", the Customs Officer found a large quantity of marijuana and was in the process of going to a neighbor's house to use the telephone when he saw the Ford Econoline making a left turn into the road that led to the shrimp docks. The Customs Officer stopped the van because he concluded that the van must be coming to remove marijuana from the boat. (S.H., pp. 26-30).

At the hearing on the Petitioner's Motion to Suppress, the Government called Customs Officer Swigert, who testified that he was approximately five miles from the King Shrimp Docks during the evening of June 10, 1978, together with other Customs Officers and members of the McIntosh County Sheriff's Department. (S.H., pp. 10-12). The officers were gathered at that spot in regard to a matter totally unrelated to the circumstances which eventually led to the search and seizure of the "Little Hornet" and the arrest of the Petitioner. (S.H., pp. 10-12). However, while gathered at this location at approximately 1:00 A.M., Swigert and the other officers observed what they believed to be a masthead light from a boat located in the Intercoastal Waterway, which was approximately four miles from the spot where the officers were standing. (S.H., pp. 13-15). The officers watched the masthead for approximately 30 minutes and the boat appeared to be going north of a channel marker and then turning around and returning to the channel marker. This maneuver was observed several times. The masthead light then began to move in the direction of Valona, where the King Shrimp

[1]The reference, "S.H." followed by page numbers refers to the transcript of the suppression hearing held prior to the trial.

Docks are located. The officers decided to drive the approximate five miles to Valona and await the arrival of the boat. (S.H. p. 18). During the drive to Valona, the officers lost sight of the light they had been observing. (S.H., p. 40).

Upon their arrival at Valona, the officers observed an approaching shrimp boat which they then identified as the "Little Hornet". Officer Swigert testified that he knew the "Little Hornet" as a result of having seen the name on a Customs suspect vessel list, Form 46-21. (S.H., pp. 19, 43). The suspect vessel list was not introduced into evidence and the source which provided this information to Customs was not identified, revealed nor was the source known to Deputy Swigert nor to any other witness who testified. Moreover, the list contained the names of four other shrimp boats which belonged to the individual who owned the "Little Hornet", who was a local shrimper by the name of Jack Gore. (S.H., pp. 19, 43).

Officer Swigert then testified that once he saw the name "Little Hornet", he decided to board and search the vessel because in his opinion, the boat was suspicious and a suspect boat. (S.H., p. 33).

Deputy Proudfoot, who was called by the Government to testify, said he was an experienced shrimper who had shrimped in the area for years and it was not unusual for a shrimper to come in at that hour of night and there was nothing unusual about a shrimper getting lost in the Intercoastal Waterway and having to search between markers at night. (S.H., pp. 60, 65-66). On the other hand, Officer Swigert testified that he had been a Customs Patrol Officer for only six months and that he had no experience with shrimping nor with the shrimping industry. (S.H., pp. 14, 33).

Once Officer Swigert decided to board the boat, he

waited until such time as the boat was secured to the dock and then boarded the "Little Hornet". (S.H., pp. 23-24). Upon boarding, Officer Swigert passed one Cahill and without stopping to identify him, entered the cabin and observed a bag near his feet. He reached into an opening in the bag and removed some substance to determine if it was in fact marijuana. (S.H., p. 24). The occupants, Thornton and Cahill, were then placed under arrest and the entire boat was searched. (S.H. p. 24). After searching the boat, Officer Swigert and Deputy Proudfoot left to make a telephone call for assistance and at that time, encountered a Ford Econoline van which was making a left-hand turn, with the left turn blinker light on, into the road which led to the King Shrimp Docks. (S.H., pp. 25-30). The occupants, Knight, D'Antignac and Petitioner Welch, were ordered from the van. (S.H., pp. 25-30). Deputy Proudfoot recognized D'Antignac as being a lifetime resident in the Valona area. Subsequently, the occupants of the van were placed under arrest and items seized from their persons which items were subsequently introduced at trial.

Petitioner was indicted in the United States District Court, Southern District of Georgia, along with four others. The four count indictment charged illegal possession and importation of marijuana, and conspiracy to commit both substantive offenses, in violation of 21 U.S.C. §§ 846, 841(a)(1), 952(a), 963 and 18 U.S.C. § 2. (R., Vol. I, pp. 17-20). On November 1, 1978, the jury returned a verdict of guilty as to all counts, and on December 15, 1978, the Petitioner was sentenced to an active term of five years as to Count I; two years as to Count II, to run consecutively with Count I; five years as to Counts III and IV, to run concurrently with Counts I and II, making a total term of imprisonment of seven years; a special parole term of five years each as to Counts I and II,

to run consecutively; and the Petitioner was fined $50,000.00. (*Id.*, pp. 19-20).

Petitioner appealed to the United States Court of Appeals for the Fifth Circuit and that court affirmed his convictions and sentences in the judgment now sought to be reviewed via this Petition. One of the issues presented in the appeal was the denial of the Motion to Suppress Evidence. In affirming, the Court of Appeals held that the U.S. Customs Officer's warrantless boarding and searching of the docked vessel for contraband, while possessed of only a reasonable suspicion that the vessel contained contraband, was legally permissible under the Fourth Amendment of the United States Constitution, even though there was no nexus between the vessel and the border. (Appendix A).

REASONS FOR GRANTING THE WRIT

INTRODUCTION

The opinion of the Fifth Circuit Court of Appeals in this case now authorizes U.S. Customs Officers to board any vessel in the United States without a warrant or probable cause, whether they be on open water or at a dock, and conduct a warrantless search for contraband merely upon reasonable suspicion that contraband is present. This holding is in direct conflict with the mandate of the Fourth Amendment of the United States Constitution as interpreted by decisions of this Court.

If allowed to stand, the opinion in this case gives U.S. Customs Officers broader powers to search for contraband at non-border locations within the limits of the United States than any other law enforcement entity. They are effectively removed from the limits of the Fourth Amendment's probable cause requirement. The case is not merely an aberration but represents constitutionally im-

proper expansion of the law by the Fifth Circuit Court of Appeals in conflict with this Court's decisions in *Almeida-Sanchez v. United States,* 413 U.S. 266 (1973) and *United States v. Brignoni-Ponce,* 422 U.S. 873 (1975).

ISSUE

WHETHER A VESSEL, TIED TO A DOCK ON THE INTERCOASTAL WATERWAY WITHOUT A NEXUS TO THE BORDER, IS SUBJECT TO A WARRANTLESS BOARDING BY A UNITED STATES CUSTOMS OFFICER WHO IS POSSESSED ONLY WITH A REASONABLE SUSPICION OF CRIMINAL ACTIVITY FOR THE EXPRESSED PURPOSE OF SEARCHING FOR CONTRABAND.

In *Almeida-Sanchez v. United States,* 413 U.S. 266 (1973), this Court held that the Fourth Amendment prohibits searches by Border Patrol Officers at locations which are not at the border or its functional equivalent on less than probable cause. The opinion noted the various Governmental interests in securing the border as justification for routine searches without probable cause at the border or its functional equivalent and the difficulties of law enforcement in securing the border. But, this Court also recognized the need to balance these Government concerns against the individual's Fourth Amendment rights. As a result, this Court refused to allow border patrol searches on less than probable cause in areas near the border but which were not at the border or its equivalent.

> It is undoubtedly within the power of the Federal Government to exclude aliens from the country. *Chae Chan Ping v. United States,* 130 US 581, 603-604, 32 L Ed 1068, 9 S Ct. 623. It is also without doubt that this power can be effectuated by routine inspections and searches of in-

> dividuals or conveyances seeking to cross our borders. . . .
>
> * * *
>
> But the search of the petitioner's automobile by a roving patrol, on a California road that lies at all points at least 20 miles north of the Mexican border,[5] was of a wholly different sort. In the absence of probable cause or consent, that search violated the petitioner's Fourth Amendment right to be free of 'unreasonable searches and seizures.'

Id. at 273.

This Court later addressed a similar problem in *United States v. Brignoni-Ponce,* 422 U.S. 873 (1975). The case differed from *Almeida-Sanchez* because the border Patrol only claimed authority to stop vehicles to question the occupants, not to search the automobiles. *Id.* at 874. Again, this decision recognized the individual's need for Fourth Amendment protection and held that any Border Patrol stop of vehicles to question its occupants at a location near the border but not at the border or its equivalent had to be based upon reasonable suspicion of a border law violation.

> Although we may assume for purposes of this case that the broad congressional power over immigration, see *Kleindienst v. Mandel,* 408 US 753, 765-767, 33 L Ed.2d 683, 92 S Ct. 2576 (1972), authorizes Congress to admit aliens on condition that they will submit to reasonable questioning about their right to be and remain in the country, this power cannot diminish the Fourth Amendment rights of citizens who may be mistaken for aliens. For the same reasons that

> the Fourth Amendment forbids stopping vehicles at random to inquire if they are carrying aliens who are illegally in the country, it also forbids stopping or detaining persons for questioning about their citizenship on less than a reasonable suspicion that they may be aliens.
>
> The effect of our decision is to limit exercise of the authority granted by both § 287(a)(1) and § 287(a)(3). *Except at the border and its functional equivalents, officers on roving patrol may stop vehicles only if they are aware of specific articulable facts, together with rational inferences from those facts, that reasonably warrant suspicion that the vehicles contain aliens who may be illegally in the country.* (Emphasis Added).

Id. at 883-884. It is clear that this Court's decision in *Brignoni-Ponce* only authorized a stop for questioning upon reasonable suspicion and did not affect the holding of *Almeida-Sanchez* which requires probable cause for a search.

The Court of Appeals for the Fifth Circuit relied upon *Brignoni-Ponce* in *United States v. Serrano,* 607 F.2d 1145 (5th Cir. 1979) to justify a Customs Officer's boarding of a shrimping vessel in Tampa Bay for a document inspection. The officers had observed some unusual activity on the part of the vessel while in the shipping channel, including running at night without lights. As the vessel headed for open waters of the Gulf of Mexico, the officers identified the vessel, themselves and then boarded. While reviewing the ship's documents and determining who aboard was the captain, the officer smelled marijuana. Ultimately, 1,312 bales of marijuana were seized.

The trial court in *Serrano* found probable cause existed to justify the boarding of the vessel. On appeal, the Fifth

Circuit did not address the issue of probable cause but held that only a reasonable suspicion was required relying on *Brignoni-Ponce, supra.* Since *Serrano* involved a boarding for a document inspection in a border area, the Fifth Circuit's application of the reasonable suspicion standard of *Brignone-Ponce* was misplaced. The boarding could have been justified as a routine one at the functional equivalent of the border since the vessel was near open waters. The court's opinion held:

> We therefore conclude that Customs officers may make an investigatory stop of a vessel on inland waters adjacent to the open Gulf of Mexico under 19 U.S.C.A. § 1581(a) on facts which justify a reasonable suspicion of illegal activity. The evidence need not support suspicion of a border crossing, but only the presence of contraband.

United States v. Serrano, 607 F.2d 1145, 1147 (5th Cir. 1979).

In the instant case, the Fifth Circuit Court of Appeals has applied *Serrano* in an expanded fashion. Unlike *Serrano,* there was no semblance of a boarding to question occupants or inspect documentation and the vessel was at dock, miles from the border, not heading for open waters. The boarding of the "Little Hornet" was to search for contraband. The Customs Officer pushed right by the first person seen on the vessel without identifying that person or asking a single question and immediately entered the pilot house. (S.H., pp. 23-24). This was a search, not an investigatory stop or document check and probable cause was required. *Almeida-Sanchez v. United States,* 413 U.S. 266 (1973). The Fifth Circuit has stretched the reasonable suspicion standard of *United States v. Brignoni-Ponce,* 422 U.S. 873 (1975) beyond its intended limits and is in

conflict with this Court's opinion in *Almeida-Sanchez*. The only valid basis for the boarding of the "Little Hornet" was probable cause.

CONCLUSION

For the reasons expressed herein, a Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A

UNITED STATES of America,
Plaintiff-Appellee,

v.

Auviene D'ANTIGNAC, a/k/a Jack D'Antignac, Patrick Glen Knight, Thomas Olden Thornton, Timothy David Cahill and Robert Wheeler Welch, Defendants-Appellants.

No. 79-5007

United States Court of Appeals,
Fifth Circuit

Oct. 20, 1980

Appeals from the United States District Court for the Southern District of Georgia.

Before INGRAHAM, RONEY and THOMAS A. CLARK, Circuit Judges.

ON PETITIONS FOR REHEARING

INGRAHAM, Circuit Judge:

Petitions for rehearing have been filed by all five defendants, and upon reconsideration of our prior slip opinions of May 2, 1980 and August 15, 1980, we vacate both opinions in their entirety and substitute in their place the following, which becomes the opinion of this court.

On July 11, 1978, the five defendants Auviene D'Antignac, Patrick Knight, Thomas Thornton, Timothy Cahill and Robert Welch were indicted on four counts in-

volving approximately 28, 310 pounds of marijuana, a Schedule I Controlled Substance. The counts alleged were: 1) importation: 2) possession with intent to distribute; 3) aiding and abetting; and, as is the custom in a scheme of this magnitude, 4) conspiracy to commit the two substantive offenses.[1] The indictment, to which all defendants pleaded not guilty, followed after the seizure and subsequent search of the M/V Little Hornet. After defendants' motion to suppress the marijuana was denied by the district court, the case went to trial and a jury convicted the defendants of all four counts of the indictment. Defendants each perfected an appeal to this court, the primary thrust of which is directed at the district court's denial of the suppression motion. For the reasons set out below, we affirm.

To begin with, this excursion involves another character who was granted immunity from prosecution in exchange for his testimony regarding this joint adventure. The unindicted co-conspirator, Jack Gore, owned several shrimp boats which he docked near Valona, McIntosh County, Georgia, at a dock he had purchased known as the old Kittles' Dock. In the early spring of 1978, Gore was approached by defendant D'Antignac with his potential get-rich-quick scheme.[2] This venture involved the use of Gore's shrimp boats to transport a large shipment of Colombian marijuana from South America to the United States. According to their plans, Gore himself would not be on board the Little Hornet during her journey.

At the time the initial arrangements were being discussed between Gore and D'Antignac, all of Gore's boats, with

[1]The original indictment, which did not encompass the importation count, was dismissed on July 12, 1978. The second indictment charged violations of 21 U.S.C. §§ 846, 841(a), 952(a), 963 and 18 U.S.C. § 2.

[2]Gore's share in the proceeds of the dope, which was later estimated at a value of $7,000,000, was to be $500,000 less expenses.

the possible exception of one old shrimp boat, were in the Gulf of Mexico, apparently fishing. The two met in Fort Myers, Florida, to finalize their plans and to ready the Little Hornet for the trip to South America. It was at this time that Gore first met the other defendants, all of whom allegedly assisted in securing supplies and loading them on the Little Hornet for the trip.[3] Although Gore's ability to recall the initial encounters with the other defendants is somewhat disputed by them, it is clear that Gore did identify them as the ones who were in Fort Myers during the final days of preparation.

All plans having been finalized, the Little Hornet departed for Colombia sometime in the latter part of May 1978. During the time just prior to her departure, and then continuously thereafter, Gore and D'Antignac kept in constant contact with each other using a rudimentary telephone code. According to the plan, Gore's only remaining duty was to be ready to pilot the boat into Kittles' Dock upon her return.

The Little Hornet returned from Colombia, her holds laden with marijuana, and on June 8, she was approximately 20-30 miles seaward of Mayport, Florida. That evening, Gore and several other persons boarded the M/V Miss Shantell and headed out to meet the Little Hornet.[4]

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[3]The government introduced into evidence numerous receipts for fuel, supplies, rigging, ice and, in particular, a long range navigational device known as a Loran.

[4]The M/V Miss Shantell was owned by Leonard Skinner, who, along with his son Richard and daughter Cheryl, accompanied Gore on the run out to the Little Hornet. The Skinners were all granted immunity in exchange for Richard's testimony.

The rendezvous was at approximately 12 P.M. the next day, June 9, and after some brief discussion between Gore and the three crew members of the Little Hornet, Thornton, Cahill and Knight, both vessels headed, back toward Sapelo Sound, just off the Georgia coast.

Once they all reached the Sound, Gore boarded the Little Hornet, as planned, to pilot her through the Intercoastal Waterway to Kittles' Dock. While en route, a smaller boat carrying at least two persons pulled up to her stern and defendant Welch boarded the Little Hornet. Shortly thereafter, around 11 P.M., Gore guided her in to the dock, his task completed.

Defendant D'Antignac now appeared at the dock and all five defendants prepared to unload their cargo. They strung up some lights to assist them. However, when the truck into which the marijuana would be loaded ran into the utility pole and knocked out all the lights and power, the defendants had to alter their plans. D'Antignac phoned Gore and told him the boat would be leaving Kittles' Dock. The Little Hornet thus began her fateful journey back out to the Intercoastal Waterway, her belly still laden with the cargo of marijuana.

On the evening of June 9, around midnight, Customs Patrol Officer Duane Swigert and some county deputies were at Brannen's Dock in Belleville, Georgia, awaiting the return of other officers investigating an unrelated matter. Looking over the area through his binoculars, Officer Swigert noticed a light atop the mast of a vessel out in the Intercoastal Waterway, about four miles away. He watched the movements of the vessel for approximately one hour; the vessel continuously moved north and then south, changing its course between the lighted channel markers several times before finally heading in toward the Valona dock area. These erratic movements, coupled with the late

hour, aroused his suspicions. He decided to investigate, so he and his fellow officers drove the five miles down the road to the Valona dock area, losing sight of the mastlight at several points along the way.

Upon arriving, Officer Swigert and his men turned off their car lights and headed into the dock area. The Little Hornet, with her name clearly appearing on her port and starboard bow, was pulling into the dock. Recalling that he had received a memorandum from his office indicating that Gore's boats, including the Little Hornet, were suspected of being involved in smuggling contraband, and observing the arrival of one of Gore's shrimp boats, coupled with the fact that to his knowledge the coastal waters were closed for shrimping, Officer Swigert's suspicions increased. He therefore decided to investigate further after the boat was docked.

After the Little Hornet was secured to the dock, Officer Swigert approached the vessel, showed his credentials to the occupant and announced he was coming aboard, although he did not have his service revolver drawn. Defendant Cahill immediately stepped back, raised his hands in disbelief and Officer Swigert boarded. He took one step to the doorway of the pilothouse, where he say defendant Thornton, the other remaining crew member. More importantly, however, he saw a large, partially opened bale right in front of his feet. Through the opening, Officer Swigert had within his plain view a quantity of a green leafy substance. He bent down and took a handful to inspect it and, after smelling it, determined that it was marijuana. He then drew his revolver and arrested Thornton. Cahill was brought in by a deputy and he too was arrested. The officers conducted an on-the-spot search of the cargo hold, which revealed the 28,310 pounds of marijuana.

When the Little Hornet and defendants Cahill and Thornton were secured, Officer Swigert and Deputy Ray Proudfoot left the boat and dock area to summon more police and set up roadblocks. As they pulled away, a Ford Econoline van carrying defendants D'Antignac, Welch and Knight approached and signaled a left turn into the, dock area, which was approximately 100 yards from the roadway. Officer Swigert's suspicions, based on his experience, told him that someone would be arriving to unload the marijuana so he stopped the van right after it completed the turn. He decided to question the three individuals to see if they had come to pick up the marijuana so he asked them to step out of the van. Questioning as to their identity and place of residence ensued but the responses were evasive and uninformative. Deputy Proudfoot identified the driver as defendant D'Antignac. Officer Swigert noticed a gun in a shoulder holdster on the suspect later identified as defendant Knight and he therefore instructed deputy Proudfoot to remove it. The third occupant was later identified as defendant Welch. Officer Swigert immediately arrested them for investigation as suspects in connection with the marijuana found on board the Little Hornet.

The five defendants were indicted by the grand jury on four count arising out of the marijuana importation venture. Gore was named a co-conspirator but was unindicted in exchange for his testimony about the scheme. The defendants moved to suppress the marijuana, alleging an unlawful seizure and subsequent search of the Little Hornet. The motion was denied and the case was tried to a jury. All five defendants were convicted on all counts and each properly perfected his appeal.

On appeal, defendants argue four main points of error, each of which they contend warrants reversal of their convictions. First, the district court erred in denying defen-

dants' motion to suppress the marijuana. Second, the district court erred in overruling defendants' objection to the testimony of unindicted co-conspirator Gore on the grounds that it was the product of undisclosed promises made to him by the government. Third, the district court erred in failing to require full compliance with defendants' discovery requests pertaining to exculpatory material. Last, the district court erred in denying defendants' motion to dismiss the indictment based upon Sixth Amendment and Jury Selection and Service Act challenges to the grand and petit jury arrays. Finding no reversible error, we affirm the convictions of all five defendants.

[1] The first question to be answered is the constitutionality of the seizure and subsequent search of the Little Hornet.[5] It is clear that customs officers are clothed with statutory authority to

> go on board of any vessel or vehicle at any place in the United States or within the customs waters or, as he may be authorized, within a customs — enforcement area established under sections 1701 and 1703 — 1711 of this title, or at any other authorized place, without as well as within his district, and examine the manifest and other documents and papers and examine, inspect, and search the vessel or vehicle and every part thereof and any person, trunk, package, or cargo on board, and to this end may hail and stop such

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[5]Given our resolution of this issue on the merits with respect to defendants Thornton and Cahill, we decline to independently assess the standing, under the standard recently expressed by the Supreme Court in *United States v. Salvucci*, ____ U.S. _____, 100 S.Ct. 2547, 65 L.Ed.2d 619 (1980), of defendants Knight, Welch, and D'Antignac to challenge the seizure and search of the Little Hornet. The government did not challenge their standing at the suppression hearing and none of the parties has briefed or argued the point before this court.

> vessel or vehicle, and use all necessary force to compel compliance.

19 U.S.C. § 1581(a). Although couched in very broad language, the statute is, of course, circumscribed by the reasonableness requirement of the Fourth Amendment.[6] *United States v. Serrano,* 607 F.2d 1145, 1147 (5th Cir.), *cert denied,* ____ U.S. _____, 100 S.Ct. 1655, 64 L.Ed.2d 241 (1980); *United States v. Freeman,* 579 F.2d 942, 945 (5th Cir. 1978).

The Fifth Circuit in recent years has been inundated with cases presenting Fourth Amendment challenges to boat stops and searches conducted by either Coast Guard or Customs officials. *E.g., United States v. Serrano, supra; United States v. Castro,* 596 F.2d 674 (5th Cir.), *cert. denied,* 444 U.S. 963, 100 S.Ct. 448, 62 L.Ed.2d 375 (1979); *United States v. Whitmire,* 595 F.2d 1303 (5th Cir.), *cert. denied,* ____ U.S. _____, 100 S.Ct. 3048, 65 L.Ed.2d 1136 (1979); *United States v. Whitaker,* 592 F.2d 826 (5th Cir.), *cert, denied,* 444 U.S. 950, 100 S.Ct. 422, 62 L.Ed.2d 320 (1979); *United States v. Freeman, supra; United States v. Warren,* 578 F.2d 1058 (5th Cir. 1978) (en banc); *United States v. Odom,* 526 F.2d 339 (5th Cir. 1976). Since these cases involve many conflicting variables regarding the vessels' registry, geographical location at the time of the initial sighting, geographical location at the time of the stop, and the standard, of suspicion required to validate the stops, the state of the law in this circuit was unclear.

[6]The Fourth Amendment to the United States Constitution guarantees that:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

This court, sitting en banc, recently decided the case of *United States v. Williams*, 617 F.2d 1063 (5th Cir. 1980). Williams involved the stop and search of a foreign vessel on the high seas[7] pursuant to 14 U.S.C. § 89(a). The court found constitutional the plenary statutory authority of the Coast Guard to *seize* a foreign vessel in international waters if there was reasonable cause to suspect that the vessel was being used to smuggle contraband into the United States. *United States v. Williams, supra,* 617 F.2d at 1075-1084. The court also held that reasonable suspicion, rather than probable cause, was the appropriate Fourth Amendment standard by which to judge the lawfulness of § 89(a) searches of the private areas of the vessel's holds conducted for the purpose of discovering contraband. *Id.* at 1087-1088. More importantly, although *Williams* did not purport to define the Fourth Amendment standards for customs searches, *see id.* at 1088 n.30 ("[o]ur analysis does not imply that the reasonable suspicion test would also govern a *customs* search of a vessel within the 12-mile limit."), it clearly negated any suggestion that the Fourth Amendment *mandates* a probable cause and/or warrant requirement to customs searches. *Id.* We therefore conclude that whatever *Williams* does to the "muddled state of our precedent." *id.* at 1071, it does not affect the standard established in *United States v. Serrano, supra,* governing customs seizures of vessels on inland waters.

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[7]As was observed by the full court in *United States v. Warren*, 578 F.2d 1058, 1064 n.4 (&5th Cir. 1978) (en banc), the "12-mile limit includes the territorial sea, which extends to three miles from the coast, and the contiguous zone, which extends from three to 12 miles from the coast." The term high seas refers to the waters "seaward of the territorial sea and thus encompass[ing] the contiguous zone." *Id.* The area of the high seas beyond the 12-mile limit is what the *Williams* court referred to as international waters. *United States v. Williams*, 617 F.2d 1063, 1073 (5th Cir. 1980).

The Little Hornet was seized in inland waters, not on the high seas.

[2] We have noted the broad statutory grant of authority in 19 U.S.C. § 1581(a); the constitutionality of the boarding of the Little Hornet turns, however, on one of the following two principles: 1) a border search; or 2) a limited investigatory stop based upon a reasonable suspicion of law violation. *See United States v. Serrano, supra; United States v. Whitmire, supra.* Although the Little Hornet, was initially sighted late at night and was a shrimp boat moving about at a time when coastal shrimping was not in season, we do not feel those facts support a finding that she had crossed the three-mile line. Moreover, we are not certain that a mere reasonable suspicion would suffice. *See United States v. Whitmire, supra,* 595 F.2d at 1307-08 & n.2. We therefore examine the second above stated principle.

[3] *Serrano* clearly holds that

> Customs officers may make an investigatory stop of a vessel on inland waters adjacent to the open Gulf of Mexico under 19 U.S.C.A. § 1581(a) on facts which justify a reasonable suspicion of illegal activity. The evidence need not support suspicion of a border crossing, but only of the presence of contraband.

United States v. Serrano, supra, 607 F.2d at 1148 (citation omitted). *See United States v. Castro, supra,* 596 F.2d at 676. We feel that *Serrano* controls this case. The facts known to Officer Swigert included the following: He observed the erratic movements of the vessel in the Intercoastal Waterway late at night for approximately one hour; there were no other vessels in the vicinity either before, during or after the sighting and subsequent boarding; he went to investigate and found a shrimp boat bearing the name Little Hornet pulling into the dock; to his knowledge coastal shrimping was out of season; he had

received prior information that the Little Hornet was suspected by the United States Customs Service of being involved in smuggling contraband; he had not seen her in the Valona dock area at all during the spring of 1978. Based on the above facts, the district court found that a reasonable suspicion of law violation existed such that Officer Swigert could make an investigatory boarding to ascertain the identity of those aboard. That finding was not error. The boarding of the Little Hornet was therefore reasonable under the Fourth Amendment scrutiny.

[4] Immediately upon stepping aboard the Little Hornet, Officer Swigert was at the doorway to the pilothouse. He then had within his plain view, in front of his feet, a partially opened bale of some green leafy substance. He suspected it to be marijuana, so he took a handful from the exposed portion and smelled and examined it. This brief examination confirmed his suspicion that the substance was marijuana and at that point, there was probable cause to search the hold of the Little Hornet for the purpose of discovering contraband. *United States v. Serrano, supra,* 607 F.2d at 1148. Moreover, there clearly existed the exigent circumstances that defendants contend were absent. The court in *Whitmire,* where the vessel was docked and the crew ashore, noted that "[i]f exigent circumstances be required, they were present as well." *United States v. Whitmire, supra,* 595 F.2d at 1316. The inherent mobility of a vessel and the attendant possibility of flight or disposal of evidence certainly amount to exigent circumstances. *See United States v. Monroy,* 614 F.2d 61, 64 (5th Cir. 1980); *United States v. Cortes,* 588 F.2d 106, 110-11 (5th Cir. 1979); *United States v. Cadena,* 588 F.2d 100, 101-02 (5th Cir. 1979) (on petition for rehearing); *United States v. Freeman, supra,* 579 F.2d at 947-48. Since we have found that the initial boarding and subsequent search of the Little Hornet was

statutorily and constitutionally valid, the district court correctly denied the motion to suppress the marijuana as to defendants Thornton and Cahill.

[5] Defendants Welch, Knight and D'Antignac also challenge the legality of the stop of the van near the scene of the seizure of the Little Hornet. Having merely existed from the public highway into the long driveway leading to the dock, the defendants claim there was no lawful reason for the stop. They argue that *Delaware v. Prouse,* 440 U.S. 648, 99 S.Ct. 1391, 59 L.Ed.2d 660 (1979), invalidates random stops to check drivers' licenses and auto registration absent articulable facts sufficient to create a reasonable suspicion concerning the driver or the vehicle's registration. *Prouse* has no application in this case. Officer Swigert did not "randomly" stop the defendants' van. He specifically stopped the van solely because it had turned into the driveway area where he had just seized a vessel loaded with marijuana, and he reasonably believed the defendants were arriving at this dock to retrieve the contraband. There were no other people around at that late hour and he merely decided to investigate the newly arrived vehicle prior to his departure to secure back-up support. The minimal intrusion of the brief stop here, occasioned by Officer Swigert's suspicions that these defendants were arriving to retrieve contraband, satisfied the Fourth Amendment requirement of reasonableness regarding investigatory stops. *See United States v. Brignoni-Ponce,* 422 U.S. 873, 878-81, 95 S.Ct. 2574, 2578-2580, 45L.Ed.2d 607, 614-616 (1975).

L.Ed.2d 607, 614-616(1975).

[6] After the three occupants got out of the van, they were immediately questioned. D'Antignac, the driver, gave evasive answers as to where he resided and stated that they had come to investigate the lights and commotion.

There were absolutely no lights and no commotion whatsover. After Officer Swigert noticed a gun in a shoulder holster on defendant Knight, he instructed Deputy Proudfoot to remove it as a precautionary measure for the officers' safety. The defendants gave no more satisfactory explanations to the officers' inquiries and at this point, the combination of all the circumstances surrounding the Little Hornet and the van gave Officer Swigert probable cause to arrest them for suspicion of involvement in the Little Hornet incident.

We therefore conclude that the investigatory boarding and search of the Little Hornet, and the investigatory stop and subsequent arrest of the occupants of the van, were lawful; the suppression motion was thus correctly denied as to all defendants.

[7] Defendants argue reversible error in the district court's overruling of their objection to the testimony of unindicted co-conspirator Gore, whose testimony the government candidly admitted was critical in securing the convictions. They argue that Gore clearly perjured himself at either the *James* hearing[8] or at the trial itself. They base their attack on the prosecutor's question to Gore implying

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[8] *See United States v. James*, 590 F.2d 575 (5th Cir.) (en banc), *cert. denied*, 442 U.S. 917, 99 S.Ct. 2836, 61 L.Ed.2d 283 (1979). Under *James*, the question of the admissibility of a co-conspirator hearsay statement offered in evidence against the defendant is a decision to be made by the judge. *James* anticipates an independent showing of admissibility by at least a preponderance of the evidence that 1) there existed a conspiracy, 2) the co-conspirator and the defendant against whom the co-conspirator hearsay statement is offered were members of the conspiracy, and 3) the statement was made during the course of and in furtherance of the conspiracy. *Id.* at 582-83.

the trial of this case occurred prior to the effective date of *James*, and the judge conducted a separate hearing outside the presence of the jury.

that Gore would be prosecuted if he perjured himself, coupled with the fact that Gore conferred with the prosecutor over a noon hour recess. Since his testimony had changed somewhat after lunch, they contend that a promise was given and such an undisclosed promise warrants reversal under the reasoning of *Giglio v. United States,* 405 U.S. 150, 92 S.Ct. 763, 31 L.Ed.2d 104 (1972) We disagree.

First, it is not at all clear that Gore perjured himself. His entire line of testimony was by way of recollection and "to the best of my ability." At the *James* hearing, he could not positively identify everyone by sight alone. All of the defendants were identified at trial, however, by sight or voice as having been in Fort Myers, Florida, or on the Little Hornet itself, aiding in the preparation of the boat. The purpose of the noon conference was merely to inform Gore that he could testify regarding a person's identification through means other than sight, and if he could identify any of the defendants by voice, then to so testify. This testimony at trial was simply more positive, not contradictory. Secondly, *Giglio* involved a case where the jury was unaware of *any* promise of immunity. Here the jury knew of the many promises made to Gore;[9] it was merely unaware of one arguably implied promise, if indeed there was one. Moreover, the underlying focus here is credibility. The jury was properly charged on credibility[10] and we

[9]The deal included the release of an $11,500,000 tax lien, return of the Little Hornet, immunity for the Little Hornet smuggling scheme, and immunity for all events arising out of an incident involving another one of Gore's boats, the M/V Stonefield Lady, which the Coast Guard found mysteriously sunken in the Gulfstream around June 26, 1978.

[10]The jury instruction included the following:

> You are the sole judges of the credibility or believability of each witness and the weight to be given to his testimony. In weighing the testimony of a witness, you should con-

do not believe that defendants' alleged error was material to the outcome. *See Giglio, supra.* Defendants' argument is without merit.

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sider his relationship to the Government or the Defendant; his interest, if any, in the outcome of the case; his manner of testifying; his opportunity to observe or acquire knowledge concerning the facts about which he testified; his candor, fairness and intelligence; and the extent to which he has been supported or contradicted by other credible evidence. You may, in short, accept or reject the testimony of any witness in whole or in part.

The testimony of an alleged accomplice, and the testimony of one who provides evidence against a Defendant as an informer for pay or for immunity from punishment or for personal advantage or vindication, must always be examined and weighed by the Jury with greater care and caution than the testimony of ordinary witnesses.

You, the Jury, must decide whether the witness' testimony has been affected by any of those circumstances, or by his interest in the outcome of the case, or by prejudice against the Defendant, or by the benefits that he has received either financially, or as a result of being immunized from prosecution; and, if you determine that the testimony of such a witness was affected by any one or more of those factors, you should keep in mind that such testimony is always to be received with caution and weighed with great care.

You should never convict any Defendant upon the unsupported testimony of such a witness, unless you believe that testimony beyond a reasonable doubt.

A witness may be discredited or impeached by contradictory evidence, or by a showing that he testified falsely concerning a material matter, or by evidence that at some other time a witness has said or done something, or has failed to say or do something, which is inconsistent with the witness' present testimony.

If you believe that any witness has been so impeached then it is your exclusive province to give the testimony of that witness such credibility or weight, if any, as you may think it deserves.

Defendants argue reversible error in the district court's failure to require full compliance with discovery requests pertaining to exculpatory material. We note that defendants' erroneous insistence on the importance of the M/V Stonefield Lady incident[11] in this case only serves to weaken their claim of reversible error. It is the Little Hornet incident that is at issue here. Analyzing defendants' argument for its content, the underlying substance merely calls into question the credibility of Gore, a point we have already addressed.

In support of their argument, defendants rely on *Brady v. Maryland,* 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2 215 (1963). *Brady's* proposition is that the withholding or suppression by the prosecution of evidence material to guilt or punishment is violative of due process. *Id.* at 87-88, 83 S.Ct. at 1196-97, 10 L.Ed.2d at 218-19. *See Giglio v. United States, supra,* 405 U.S. at 154, 92 S.Ct. at 766, 31 L.Ed.2d at 108 (a finding of materiality of the evidence is required under *Brady).* The recent case of *United States v. Agurs,* 427 U.S. 97, 96 S.Ct. 2392, 49 L.Ed2d 342 (1976), provides the standard of materiality of undisclosed evidence. The omitted evidence must create a reasonable doubt of guilt that did not otherwise exist in order to justify a new trial. *Id.* at 112-13, 96 S.Ct. at 2401-02, 49 L.Ed.2d at 354-55. Neither *Giglio* nor *Brady* provides support for defendants since their discovery requests were tailored for impeachment purposes that could be described as cumulative at best. Moreover, the overwhelming evidence of guilt in this case belies any notion that the discovery material might have created a reasonable doubt. *See Agurs, supra.*

[8] Assuming, arguendo, that the discovery requests included evidence material to guilt or punishment, we would

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[11] *See* note 9 *supra.*

nevertheless uphold the district court on this matter. The government complied with court orders for production of documents to the extent of over 340 pages in the record. Defendants simply were not satisfied with the quantum of arguably exculpatory material, if any of it truly was exculpatory, and they now contend, with no citation of authority, that this was insufficient. The district court did not err in denying defendants' motion to dismiss, or alternatively, in not ordering more discovery.[12]

[9] Defendants' last argument is that the district court erred in denying their motion to dismiss the indictment based upon a challenge to the grand and petit jury arrays. This same challenge in the same judicial district was considered and discussed at length in *United States v. Maskeny,* 609 F.2d 183 (5th Cir.), *cert. denied,* ____ U.S. _____, 100 S.Ct. 3010, 65 L.Ed.2d 1112 (1980). There the court found no constitutional or statutory infirmity with the process of grand and petit jury selection that would have warranted reversal of the convictions. We do not feel there is a legally significant distinction between the two cases and, accordingly, we reject defendants' juror selection challenges under the Sixth Amendment and the Jury Selection and Service Act, 28 U.S.C. §§ 1861-1869 for the same reasons set out in *United States v. Maskeny, supra,* 609 F.2d at 189-94. *See also United States v. Butler,* 611 F.2d 1066, 1069-70 (5th Cir. 1980).

In summary, we reiterate that the case of *United States v. Serrano, supra,* is controlling on the issue of the constitutionality of the seizure and subsequent search of the Little Hornet. Having reconsidered fully the various

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[12]In its brief, the government states that it has supplied FBI materials to defendants right up to November 28, 1979, as they became available. The government contended earlier that some of the matters sought simply did not exist.

challenges raised by defendants, we find that the district court did not err in denying the motion to suppress the marijuana. Furthermore, defendants' other arguments are meritless for the reasons above discussed. The convictions are therefore AFFIRMED.

THOMAS A. CLARK, Circuit Judge, concurring:

I concur that the district court was correct in denying the motion to suppress the seized marijuana.

However, since I get there by a little different route, I wish to express my reasons. The majority opinion holds that the facts are sufficient to support a limited investigatory stop. I think the facts are too thin. At slip opinion page 476, page _____, the opinion states "the constitutionality of the boarding of the Little Hornet turns, however, on one of the following two principles: 1) a border search; or 2) a limited investigatory stop based upon a reasonable suspicion of law violation." I do not think these principles have to be considered disjunctively.

Most people's mental processes are not compartmentalized and judges fall into the category of "most people." Officer Swigert considered the observations attributed to him on slip opinion pages 477, 478, page ____, of the opinion, but he also considered that this was a shrimp boat coming into a dock on the Atlantic from points unknown, when coastal shrimping was not in season. While the majority opinion says that this fact alone would not support a border search, with which I agree, I think this fact, when coupled with the facts relied upon by the majority, gave the officers sufficient grounds to board the vessel.

The Supreme Court at its last term decided *United States v. Mendenhall,* ____ U.S. _____, 100 S.Ct. 1870, 64 L.Ed.2d 497 (1980), in which it approved the combining of a series of totally innocent facts to constitute a drug

courier profile. Based upon such a profile, the court sustained an investigatory stop. While the present case does not involve the drug courier profile, it does suggest use of the common admonition that courts "may consider the totality of circumstances" in determining if a given set of facts add to a reasonable conclusion. Facts too narrow to support either an investigatory stop or a border search, when combined can support the stop.

Consequently, it is my view that here it was proper for the officer to consider the nature of the vessel, that it was not the shrimping season, and that a border crossing was certainly possible, and perhaps even probable. Based upon considering these added facts to the facts relied upon by the majority opinion, I have no problem with concurring.

APPENDIX B

UNITED STATES of America,
Plaintiff-Appellee,

v.

Auviene D'ANTIGNAC, a/k/a Jack D'Antignac, Patrick Glen Knight, Thomas Olden Thornton, Timothy David Cahill and Robert Wheeler Welch, Defendants-Appellants.

No. 79-5007.

United States Court of Appeals,
Fifth Circuit.

May 2, 1980.

Appeals from the United States District Court for the Southern District of Georgia.

Before INGRAHAM, RONEY and THOMAS A. CLARK, Circuit Judges.

INGRAHAM, Circuit Judge:

On July 11, 1978, the five defendants Auviene D'Antignac, Patrick Knight, Thomas Thornton, Timothy Cahill and Robert Welch were indicted on four counts involving approximately 28,310 pounds of marijuana, a Schedule I Controlled Substance. The counts alleged were: 1) importation; 2) possession with intent to distribute; 3) aiding and abetting; and, as is the custom in a scheme of this magnitude, 4) conspiracy to commit the two substan-

tive offenses.[1] The indictment, to which all defendants plead not guilty, followed after the seizure and subsequent search of the M/V Little Hornet. After defendants' motion to suppress the marijuana was denid by the district court, the case went to trial and a jury convicted the defendants of all four counts of the indictment. Defendants ask us to hoist our judicial anchor and sail into domestic waters, dropping anchor at a new crossroad of Fourth Amendment reasonableness and customs authority. We need not do so for we find our present position to be constitutionally sound, and accordingly, we affirm the convictions.

To begin with, this excursion involves another character who was granted immunity from prosecution in exchange for his testimony regarding this joint adventure. The unindicted co-conspirator, Jack Gore, owned several shrimp boats which he docked near Valona, McIntosh County, Georgia, at a dock he had purchased known as the old Kittles' Dock. Gore had been weathering some rough financial times during early 1978 and was therefore interested when defendant D'Antignac approached him with the get-rich-quick scheme.[2] This venture involved the use of one of Gore's shrimp boats to transport a large shipment of Colombian marijuana from South America to the United States. According to their plans, Gore himself would not have to pilot the boat; in fact, he would not even be on board the Little Hornet during her journey.

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[1]The original indictment, which did not encompass the importation count, was dismissed on July 12, 1978. The second indictment charged violations of 21 U.S.C. §§ 846, 841(a), 952(a), 963 and 18 U.S.C. § 2.

[2]Gore's share in the proceeds of the dope, which was later estimated at a value of $7,000,000, was to be $500,000 less expenses.

At the time the initial arrangements were being discussed between Gore and D'Antignac, all of Gore's boats, with the possible exception of one old shrimp boat, were in the Gulf of Mexico, apparently fishing. The two met in Fort Myers, Florida, to finalize their plans and to ready the Little Hornet for the trip to South America. It was at this time that Gore first met the other defendants, all of whom allegedly assisted in securing supplies and loading them on the Little Hornet for the trip.[3] Although Gore's ability to recall the initial encounters with the other defendants are somewhat disputed by them, it is clear that Gore did identify them as the ones who were in Fort Myers during the final days of preparation.

All plans having been finalized, the Little Hornet departed for Colombia sometime in the latter part of May 1978. During the time just prior to her departure, and then continuously thereafter, Gore and D'Antignac kept in constant contact with each other using a rudimentary telephone code. According to the plan, Gore's only remaining duty was to be ready to pilot the boat into Kittles' Dock upon her return.

Laden with her cargo, the Little Hornet journeyed homeward, and on June 8, she was approximately 25-30 miles seaward of Mayport, Florida. That evening, Gore and several other persons boarded the M/V Miss Shantell and headed out to meet the Little Hornet.[4] The rendez-

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[3]The government introduced into evidence numerous receipts for fuel, supplies, rigging, ice and, in particular, a long range navigational device known as Loran.

[4]The M/V Shantell was owned by Leonard Skinner, who, along with his son Richard and daughter Cheryl, accompanied Gore on the run out to the Little Hornet. The Skinners were all granted immunity in exchange for Richard's testimony.

vous was at approximately 12 o'clock noon the next day, June 9, and after some brief discussion between Gore and the three crew members of the Little Hornet, Thornton, Cahill and Knight, both vessels headed back toward Sapelo Sound, just off the Georgia coast.

Once they all reached the Sound, Gore boarded the Little Hornet, as planned, to prepare to take her through the narrow and sometimes deceptive Intercoastal Waterway to Kittles' Dock. Darkness beginning to set in, Gore maneuvered the Little Hornet up the waterway, avoiding the high spots where she might run aground. While en route, a smaller boat carrying at least two persons pulled up to her stern and defendant Welch boarded the Little Hornet. Shortly thereafter, around 11 P.M., Gore guided her in to the dock, and his task was completed.

Defendant D'Antignac now appeared at the dock and all five defendants prepared to unload their cargo. They strung up some lights to assist them. However, when the truck into which the marijuana would be loaded ran into the utility pole and knocked out all the lights and power, the defendants had to alter their plans. Therefore, D'Antignac phoned Gore and told him the boat would be leaving Kittles' Dock. The Little Hornet thus began her fateful journey back out to the Intercoastal Waterway, her belly still laden with the cargo of marijuana.

On the evening of June 9, around midnight, Customs Patrol Officer Duane Swigert and some county deputies were at Brannen's Dock in Belleville, Georgia, awaiting the return of some officers investigating an unrelated matter. Looking over the area through his binoculars, Officer Swigert noticed a light atop the mast of a vessel out in the Intercoastal Waterway, some four miles away. He watched the movements of the vessel for approximately one hour; the vessel continously moved north and then south,

chang g its course between the lighted channel markers several times before finally heading in toward the Valona dock area. These erratic movements, coupled with the late hour, aroused his suspicions. He therefore decided to investigate, so he and his fellow officers drove the five miles down the road to the Valona dock area, losing sight of the mastlight at several points along the way.

Upon arriving, Officer Swigert and his men turned off their car lights and headed into the dock area. The Little Hornet, with her name clearly appearing on her port and starboard bow, was pulling into the dock.

Officer Swigert had received a memorandum from his office indicating that Gore's boats were suspected of being involved in smuggling, although the source and reliability of that information was not clear. Recalling that the Little Hornet was on the list, Officer Swiget's suspicions became even greater and he decided to board the vessel as soon as she was secured to the dock. Officer Swigert then approached the occupants of the vessel, showed his credentials and announced he was coming aboard, although he did not have his service revolver drawn. Defendant Cahill immediately stepped back, raised his hands in disbelief and Officer Swigert boarded, his first two steps aboard placing him at the doorway to the pilothouse.

A quick glance through the pilothouse revealed the other crew member, defendant Thornton, but more importantly, a large bale right down at Officer Swigert's feet. The bundle was torn open, revealing a green leafy substance. Officer Swigert then took a handful to inspect it and, after smelling it, determined it to be marijuana. He then drew his revolver and arrested Thornton. Cahill was brought in by a deputy and he too was arrested. The officers conducted an on-the-spot search which revealed the 28,310 pounds of marijuana in the Little Hornet's hold.

When the Little Hornet and defendants Cahill and Thornton were secured, Officer Swigert and Deputy Ray Proudfoot left the boat and dock area to summon more police and set up roadblocks. As they pulled away, a Ford Econoline van carrying defendants D'Antignac, Welch and Knight approached and signaled a left turn into the dock area, which was approximately 100 yards from the roadway. Officer Swigerts' suspicions, based on his experience, told him that someone had to be arriving to unload the marijuana so he stopped the van right after it completed the turn. He had decided to question the three individuals to see if they had come to pick up the marijuana so he asked them to step out of the van. Questioning as to their identity and place of residence ensued but the responses were unsatisfactory. Deputy Proudfoot identified the driver as defendant D'Antignac. Officer Swigert noticed a gun in a shoulder holster on the suspect later identified as defendant Knight and he therefore instructed Deputy Proudfoot to remove it. The third occupant was later identified as defendant Welch. Officer Swigert immediately arrested them for investigation as suspects in connection with the marijuana found on board the Little Hornet.

The five defendants were indicted by the grand jury on four counts arising out of the marijuana importation venture.[5] Gore was named a co-conspirator but was unindicted in exchange for his testimony about the scheme. The defendants moved to suppress the marijuana, alleging an unlawful seizure and subsequent search of the Little Hornet. The motion was denied and the case was tried to a jury. All five defendants were convicted on all counts and each properly perfected his appeal.

On appeal, defendants argue four main points of error, each of which they contend warrants reversal of their con-

[5] *See* note 1 *supra*.

victions. First, the district court erred in denying defendants' motion to suppress the marijuana. Second, the district court erred in overruling defendants' objection to the testimony of unindicted co-conspirator Gore on the grounds that it was the product of undisclosed promises made to him by the government. Third, the district court erred in failing to require full compliance with defendants' discovery requests pertaining to exculpatory material. Last, the district court erred in denying defendant's motion to dismiss the indictment based upon Sixth Amendment and Jury Selection and Service Act challenges to the grand and petit jury arrays. We have scrutinized the record, briefs and oral arguments with great care and, finding no reversible error in the district court's judgment or rulings, we affirm the convictions of all five defendants.

Initially we note that none of the parties has briefed or argued the standing of defendants Knight, Welch and D'Antignac to challenge the seizure and search of the Little Hornet. Limited as we are by Article III to adjudicating cases or controversies arising under either the Constitution or federal law, we must inquire whether any of those defendants' Fourth Amendment rights were violated such that they have standing to challenge the search and seizure. The old rule of automatic standing in *Jones v. United States,* 362 U.S. 257, 80 S.Ct. 725, 4 L.Ed.2d 697 (1960), which was narrowed by *Brown v. United States,* 411 U.S. 223, 93 S.Ct. 1565, 36 L.Ed.2d 208 (1973) (possession of the evidence must be *at the time* of the contested search), may not enjoy its original vitality. The focus has shifted to a singular analysis of the substantive Fourth Amendment rights of the defendant rather than a bifurcated examination in which standing is treated separately. *Rakas v. Illinois,* 439 U.S. 128, 99 S.Ct. 421, 58 L.Ed.2d 387 (1978). This is turn has centered on the defendants' reasonable expectation of privacy in the premises searched. *Rakas, supra.* Since we have serious

questions about the expectation of privacy that Knight, Welch and D'Antignac would have in the pilothouse of the Little Hornet, the survival of the rule of automatic standing is critical. But *see United States v. Whitaker,* 592 F.2d 826, 828 n.2 (5th Cir. 1979), *cert. denied,* ____ U.S. ____, 100 S.Ct. 422, 62 L.Ed.2d 320 (1979).

[1] The Supreme Court in *Rakas* has clearly left open the question of the continued viability of automatic standing, in light of its decision in *Brown v. United States, supra,* and *Simmons v. United States,* 390 U.S. 377, 88 S.Ct. 967, 19 L.Ed.2d 1247 (1968). *Rakas v. Illinois, supra,* 439 U.S. at 135 n.4. We also leave that question for another day. Suffice it to say that since possession of the marijuana was an essential element of Count II, 21 U.S.C. § 841(a)(1), defendants Knight, Welch and D'Antignac have standing under current Fourth Amendment exegesis to challenge the search and seizure of the Little Hornet.

[2] We next confront the complex and continuously litigated issue in the Fifth Circuit regarding the legality of customs stops and searches of shrimp boats in, around and adjacent to the Gulf of Mexico. To simplify the analysis we first point out that there was ample probable cause for the search of the Little Hornet *after* Officer Swigert boarded her. He had within his plain view a bale of what he suspected to be marijuana and, after smelling and examining it, was justified in searching the vessel. *United States v. Serrano,* 607 F.2d 1145, 1148 (5th Cir. 1979); *United States v. Castro,* 596 F.2d 674, 676 (5th Cir. 1979), *cert. denied,* ____ U.S. ____, 100 S.Ct. 448, 62 L.Ed.2d 375 (1979); *United States v. Freeman,* 579 F.2d 942, 948 (5th Cir. 1978).[6]

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[6]Although we cite with approval *Freeman's* holding that the plain view provided probable cause, we do not intimate that exigent circumstances were required, as might be inferred from its language. *See generally United States v. Freeman, supra,* 579 F.2d at 948.

[3] Defendants argue, however, that the Constitution requires probable cause plus a warrant for exigent circumstances for a search to be reasonable. Since both the Little Hornet and her crew were secured, there were no longer any exigent circumstances, and, argue defendants, Officer Swigert was thus required to secure a warrant. This argument asks us to continue analogizing the searches of nautical vessels to those of land-based vehicles. We agree with the panel in *United States v. Whitmire,* 595 F.2d 1303 (5th Cir. 1979), and its historical analysis of the Fourth Amendment warrant requirement as proposed by the same Congress that enacted the first revenue statutes authorizing customs searches, *id.* at 1309-10, and "resist the urge to impose uncritically on boat searches the set of standards governing auto searches on our internal highways." *Id.* at 1312.[7] We therefore agree with our brethren in *Serrano* and hold that probable cause alone is sufficient for a customs search on a nautical vessel *after* a lawful stop and boarding. *See United States v. Serrano, supra,* 607 F.2d at 1148.

Our inquiry does not end here, however, since we must determine the lawfulness of the initial boarding of the Little Hornet. If the boarding was unlawful, then the results of the subsequent search are "tainted fruit" and, under the teaching of *Wong Sun v. United States,* 371 U.S. 471, 83 S.Ct. 407, 9 L.Ed.2d 441 (1963), should have been suppressed by the district court.

[4, 5] The statutory authority of Officer Swigert to board the Little Hornet is clear. Under 19 U.S.C. § 1581(a). customs officers are authorized

[7] *See also United States v. Ingham,* 502 F.2d 1287, 1290 (5th Cir. 1974), *cert. denied,* 421 U.S. 911, 95 S.Ct. 1566, 43 L.Ed.2d 777 (1975), where the court emphasizes a substantial distinction between a landlocked vehicle and a nautical vessel for purposes of Fourth Amendment analysis.

> [to] go on board of any vessel or vehicle at any place in the United States or within the customs waters or, as he may be authorized, within a customs-enforcement area established under sections 1701 and 1703-1711 of this title, or at any other authorized place, without as well as within his district, and examine the manifest and other documents and papers and examine, inspect, and search the vessel or vehicle and every part thereof and any person, trunk, package, or cargo on board, and to this end may hail and stop such vessel or vehicle, and use all necessary force to compel compliance.

Although this language appears to grant virtually unlimited authority to board and search,[8] the statute is, of course, circumscribed by the reasonableness requirement of the Fourth Amendment.[9] *United States v. Serrano, supra,* 607 F.2d at 1147; *United States v. Freeman, supra* 579 F.2d at 945.

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[8]We reject defendants' argument that customs agents must have a specific intent to check for safety and documents prior to or at the time of boarding. The statute imposes no such requirement. *See generally United States v. Serrano,* 607 F.2d 1145 (5th Cir. 1979). Defendants' reliance on *United States v. Whitmire,* 595 F.2d 1303 (5th Cir. 1979), is misplaced. *Whitmire* involved a reasonable suspicion of illegal activity *followed by* an unsatisfactory document check onshore, which served to heighten the officers' suspicion. We do not read *Whitmire* as *requiring* an intent to check documents.

[9]The Fourth Amendment to the United States Constitution guarantees that:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

[6, 7] The Fourth Amendment standard of reasonableness which serves to limit the scope of § 1581 has been considered often in this circuit. Under such scrutiny, the statute has been construed to clearly allow a stop of any vessel in customs waters without even a modicum of suspicion of criminal activity. *United States v. Freeman, supra* 579 F.2d at 945-46. And, in *United States v. Whitaker,* 592 F.2d 826, 829 (5th Cir. 1979), *cert. denied,* ____ U.S. ____, 100 S.Ct. 422, 62 L.Ed.2d 320 (1979), this court applied the *Freeman* standard and construed § 1581 to permit, without any suspicion of criminal activity, an inland waters stop of a vessel initially sighted in customs waters.

However, as we sail into the calmer inland water, with no preceding customs waters sighting, the Fourth Amendment imposes a stricter, standard of reasonableness. Accordingly, § 1581 has been construed to permit the stop of a vessel initially sighted in inland waters on articulable facts justifying a reasonable suspicion of a customs violation. *United States v. Whitmire,* 595 F.2d 1303, 1315-16 (5th Cir. 1979). More recently, we concluded that

> Customs officers may make an investigatory stop of a vessel on inland waters adjacent to the open Gulf of Mexico under 19 U.S.C.A. § 1581(a) on facts which justify a reasonable suspicion of illegal activity. The evidence need not support suspicion of a border crossing, but only of the presence of contraband.

United States v. Serrano, supra, 607 F.2d at 1148 (citation omitted). *See United States v. Castro, supra,* 596 F.2d at 676. Considering the foregoing, it is our opinion that we need not define the *minimum* standard of cause required

to survive Fourth Amendment scrutiny.[10] We have not reached that point. Rather, we think that the "reasonable suspicion of illegal activity" standard found sufficient in *Serrano, Castro* and *Whitmire, supra,* is the standard by which to measure the lawfulness of the boarding of the Little Hornet.

[8] We thus turn to the articulable facts known to Officer Swigert, as found by the district court and supported in the record, to determine whether his actions reasonable. The facts in evidence showed that Officer Swigert observed the erratic movements of the vessel for approximately one hour; the boat was circling around back and forth in the waterway and appeared to him to be either lost or awaiting some other event. The hour was late and there were no other boats in the vicinity. These two factors were the basis of his decision to investigate the vessel when it headed for the Valona dock area. Upon his arrival at the dock, he saw clearly that the vessel docking was a shrimp boat with her name, Little Hornet, appearing on the bow. He had been informed by his superiors that she belonged to Jack Gore and was suspected of being involved in smuggling contraband.[11] Moreover, based on his experience

[10]Were we to define the minimum Fourth Amendment requirements of cause for an inland waters customs search, it would be necessary to analyze carefully the language and history of 19 U.S.C. § 1581 and the government's interests in regulating nautical vessels. The *Whitmire* panel conducted such an analysis and found that a reasonable suspicion of an international crossing is enough cause to satisfy the Fourth Amendment reasonableness requirement. *United States v. Whitmire, supra,* 595 F2d at 1309-16. Similarly, the *Serrano* panel found that a reasonable suspicion of illegal activity was constitutionally sufficient. Thus, it appears that reasonable suspicion is the consensus standard at this point; however, neither *Serrano* nor *Whitmire* say that this is the constitutional minimum.

[11]At the suppression hearing, the district court found that the Customs Service had reasonable grounds to conclude that Gore's boats were involved in smuggling. That finding is not specifically challenged and we therefore accept it.

and the time of year, Officer Swigert knew that the coastal waters were closed for shrimping and the only shrimping presently being conducted was within international waters.[12]

The district court found that the above facts gave Officer Swigert a reasonable suspicion that the Little Hornet was involved in illegal activity. Based upon our reading of the record at the suppression hearing, we cannot say that this was error. The totality of the articulable facts and circumstances known to Officer Swigert at the time were sufficient to give him reasonable grounds to believe a customs violation had taken place. His action in boarding the Little Hornet was therefore reasonable for purposes of the Fourth Amendment. Once lawfully aboard, as we noted earlier, ample probable cause existed for the search.

[9] Having resolved the questions of the lawfulness of Officer Swigert's actions aboard the Little Hornet, we turn to the arguments of defendants Welch, Knight and D'Antignac challenging the stop of the van. Although Officer Swigert had only one articulated reason for stopping the van, we are aware of no case suggesting a minimum number in order to constitute a reasonable suspicion. The fact that he knew or believed someone would presently have to come and unload the marijuana gave him reasonable grounds to make an investigatory stop of the van. The defendants argue that *Delaware v. Prouse,* 440 U.S. 648, 99 S.Ct. 1391, 59 L.Ed.2d 660 (1979), in-

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[12]There was testimony that some brown shrimping was in season. However, Officer Swigert testified that to his knowledge, there was no shrimping within the three-mile limit. To understand why the shrimping factor was relevant, it must be noted that Officer Swigert had been on the lookout for Gore's boats, including the Little Hornet, during the entire spring of 1978. He heard reports from other fishermen and shrimpers that all of Gore's boats were in the Gulf fishing, and, he testified, he had not seen the Little Hornet or any of Gore's other boats in the area at all.

validates random stops to check drivers' licenses and auto registration absent articulable facts sufficient to create a reasonable suspicion concerning the driver or the vehicle's registration. While we agree with that proposition, it has no application here. Officer Swigert did not "randomly" stop the defendant's van. He specifically stopped the van because it had turned into the driveway area where he had just seized a vessel loaded with marijuana, and he believed the defendants were arriving at this dock to retrieve the contraband. The initial investigatory stop of the van was lawful.

[10] After the three occupants got out of the van, they were asked questions immediately. D'Antignac, the driver, gave evasive answers as to where he resided and stated that they had come to investigate the lights and commotion. There were no lights and no commotion whatsoever. After Officer Swigert noticed a gun in a shoulder holster on defendant Knight, he instructed Deputy Proudfoot to remove it for the officers' safety. The defendants gave no more satisfactory explanations and at this point the combination of *all* the circumstances surrounding the Little Hornet and the van gave Officer Swigert probable cause to arrest them for suspicion of involvement in the Little Hornet incident.

Based on all the foregoing, we conclude that there was a lawful boarding (stop) of the Little Hornet, followed by probable cause to search the vessel, reasonable suspicion to make an investigatory stop of the van and subsequently, probable cause to arrest its occupants. Therefore, the district court did not err when it denied the defendants' motion to suppress the marijuana.

[11, 12] Defendants argue reversible error in the district court's overruling of their objection to the testimony of unindicted co-conspirator Gore, whose testimony the

government candidly admitted was critical in securing the convictions. They argue that Gore clearly perjured himself at either the *James* hearing[13] or at the trial itself. They base their attack on the prosecutor's question to Gore implying that Gore would be prosecuted if he perjured himself, coupled with the fact that Gore conferred with the prosecutor over a noon hour recess. Since his testimony had changed somewhat after lunch, they contend that a promise was given and such an undisclosed promise warrants reversal under the reasoning of *Giglio v. United States,* 405 U.S. 150, 92 S.Ct. 763, 31 L.Ed.2d 104 (1972). We disagree.

First, it is not at all clear that Gore perjured himself. His entire line of testimony was by way of recollection and "to the best of my ability." At the *James* hearing, he could not positively identify everyone by sight alone. All of the defendants were identified at trial, however, by sight or voice as having been in Fort Myers, Florida, or on the Little Hornet itself, aiding in the preparation of the boat. The purpose of the noon conference was merely to inform Gore that he could testify regarding a person's identification through means other than sight, and if he could identify any of the defendants by voice, then to so testify. This testimony at trial was simply more positive, not contradictory. Secondly, *Giglio* involved a case where the jury was unaware of *any* promise of immunity. Here the jury knew

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[13] *United States v. James,* 590 F.2d 575 (5th Cir. 1979) (en banc), *cert denied,* _____ U.S. _____, 99 S.Ct. 2836 61 L.Ed.2d 283, requires a hearing outside the presence of the jury. The judge must determine whether any co-conspirator hearsay statements are to be admissible in evidence against the other co-conspirators.

of the many promises made to Gore;[14] it was merely unaware of one arguably implied promise, if indeed there was one. Moreover, the underlying focus here is credibility. The jury was properly charged on credibility[15] and we

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[14]The deal included the release of an $11,500,000 tax lien, return of the Little Hornet, immunity for the Little Hornet smuggling scheme, and immunity for all events arising out of another incident involving one of Gore's boats, the M/V Stonefield Lady, which the Coast Guard found mysteriously sunken in the Gulfstream around June 26, 1978.

[15]The jury instruction included the following:

> You are the sole judges of the credibility or believability of each witness and the weight to be given to his testimony. In weighing the testimony of a witness, you should consider his relationship to the Government or the Defendant; his interest, if any, in the outcome of the case; his manner of testifying; his opportunity to observe or acquire knowledge concerning the facts about which he testified; his candor, fairness and intelligence; and the extent to which he has been supported or contradicted by other credible evidence. You may, in short, accept or reject the testimony of any witness in whole or in part.
>
> The testimony of an alleged accomplice, and the testimony of one who provides evidence against a Defendant as an informer for pay or for immunity from punishment or for personal advantage or vindication, must always be examine and weighed by the Jury with greater care and caution than the testimony of ordinary witnesses.
>
> You, the Jury, must decide whether the witness' testimony has been affected by any of those circumstances, or by his interest in the outcome of the case, or by prejudice against the Defendant, or by the benefits that he has received either financially, or as a result of being immunized from prosecution; and, if you determine that the testimony of such a witness was affected by any one or more of those factors, you should keep in mind that such testimony is always to be received with caution and weighed with great care.
>
> You should never convict any Defendant upon the unsupported testimony of such a witness, unless you believe that testimony beyond a reasonable doubt.

do not believe that defendants' alleged error was material to the outcome. *See Giglio, supra.* Defendant's argument is without merit.

Defendants argue reversible error in the district court's failure to require full compliance with discovery requests pertaining to exculpatory material. We note that defendants' erroneous insistence on the importance of the Stonefield Lady incident[16] in this case only serves to weaken their claim of reversible error. It is the Little Hornet incident that is at issue here. Analyzing defendants' argument for its content, the underlying substance merely calls into question the credibility of Gore, a point we have already addressed.

[13, 14] In support of their argument, defendants rely on *Brady v. Maryland,* 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963). *Brady's* proposition is that the withholding or suppression by the prosecution of evidence material to guilt or punishment is violative of due process. *Id.* at 87-88, 83 S.Ct. at 1196-1197, 10 L.Ed.2d at 218-219. *See also Giglio v. United States, supra,* 405 U.S. at 154, 92 S.Ct. at 766, 31 L.Ed.2d at 108 (a finding of materiality of the evidence is required under *Brady*). The recent of *United States v. Agurs,* 427 U.S. 97, 96 S.Ct. 2392, 49

A witness may be discredited or impeached by contradictory evidence, or by a showing that he testified falsely concerning a material matter, or by evidence that at some other time a witness has said or done something, or has failed to say or do something, which is inconsistent with the witness' present testimony.

If you believe that any witness has been so impeached then it is your exclusive province to give the testimony of that witness such credibility or weight, if any, as you may think it deserves.

[16]*See* note 14 *supra.*

L.Ed.2d 342 (1976), provides the standard of materiality of undisclosed evidence. The omitted evidence must create a reasonable doubt of guilt that did not otherwise exist in order to justify a new trial. *Id.* at 112-13, 96 S.Ct. at 2401-2402, 49 L.Ed.2d at 354-355. Neither *Giglio* nor *Brady* provides support for defendants since their discovery requests were tailored for impeachment purposes that could be described as cumulative at best. Moreover, the overwhelming evidence of guilt in this case belies any notion that the discovery material might have created a reasonable doubt. *See Agurs, supra.*

[15] Assuming arguendo that the discovery requests included evidence material to guilt or punishment, we would nevertheless uphold the district court on this matter. The government complied with court orders for production of documents to the extent of over 340 pages in the record. Defendants simply were not satisfied with the quantum of arguably exculpatory material, if any of it truly was exculpatory, and they now contend, with no citation of authority, that this was insufficient. The district court did not err in denying defendants' motion to dismiss or, alternatively, in not ordering more discovery.[17]

Defendants' last argument is that the district court erred in denying their motion to dismiss the indictment based upon a challenge to the grand and petit jury arrays. This same challenge in the same judicial district was considered and discussed at length in *United States v. Maskeny,* 609 F.2d 183 (5th Cir. 1980). This court found no constitutional or statutory infirmity with the process of grand and petit jury selection that would have warranted reversal of the convictions. We do not feel that there is a legally

[17]In its brief, the government states that it has supplied FBI materials to defendants right up to November 28, 1979, as they became available. The government contended earlier that some of the matter sought simply did not exist.

significant distinction between the two cases and, accordingly, we reject defendants' juror selection challenges under the Sixth Amendment and the Jury Selection and Service Act, 28 U.S.C. §§ 1861-1869 for the same reason set out in *United States v. Maskeny, supra,* 609 F.2d at 189-94.

In summary, the defendants no doubt waited anxiously for their ship to come in. From the manner and circumstances of her arrival, considered in light of the foregoing determinations, they may wish she had met the fate of the Stonefield Lady. Since the district court correctly denied the motion to suppress the Little Hornet's contraband and committed no reversible error in its other rulings, the convictions are

AFFIRMED.

APPENDIX B

UNITED STATES of America,
Plaintiff-Appellee,

v.

Auviene D'ANTIGNAC, a/k/a Jack D'Antignac, Patrick Glen Knight, Thomas Olden Thornton, Timonthy David Cahill and Robert Wheeler Welch, Defendants-Appellants.

No. 79-5007.

United States Court of Appeals,
Fifth Circuit.

Aug. 15, 1980.

Appeals from the United States District Court for the Southern District of Georgia.

ON PETITION FOR REHEARING
AND PETITION FOR REHEARING EN BANC

Before INGRAHAM, RONEY and THOMAS A. CLARK, Circuit Judges.

INGRAHAM, Circuit Judge:

Petitions for rehearing have been filed by all five defendants, and upon reconsideration of our prior slip opinion of May 2, 1980, we vacate the entire opinion and substitute in its place the following, which becomes the opinion of this court.

On July 11, 1978, the five defendants Auviene D'Antignac, Patrick Knight, Thomas Thornton, Timothy Cahill and Robert Welch were indicted on four counts involving approximately 28,310 pounds of marijuana, a Schedule I Controlled Substance. The counts alleged were: 1) importation; 2) possession with intent to distribute; 3) aiding and abetting; and, as is the custom in a scheme of this magnitude, 4) conspiracy to commit the two substantive offenses.[1] The indictment, to which all defendants pleaded not guilty, followed after the seizure and subsequent search of the M/V Little Hornet. After defendants' motion to suppress the marijuana was denied by the district court, the case went to trial and a jury convicted the defendants of all four counts of the indictment. Defendants each perfected an appeal to this court, the primary thrust of which is directed at the district court's denial of the suppression motion. For the reasons set out below, we affirm.

To begin with, this excursion involves another character who was granted immunity from prosecution in exchange for his testimony regarding this joint adventure. The unindicted co-conspirator, Jack Gore, owned several shrimp boats which he docked near Valona, McIntosh County, Georgia, at a dock he had purchased known as the old Kittles' Dock. In the early spring of 1978, Gore was approached by defendant D'Antignac with his potential get-rich-quick scheme.[2] This venture involved the use of Gore's shrimp boats to transport a large shipment of Colombian marijuana from South America to the United States. According to their plans, Gore himself would not be on board the Little Hornet during her journey.

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[1]The original indictment, which did not encompass the importation count, was dismissed on July 12, 1978. The second indictment charged violations of 21 U.S.C. §§ 846, 841(a), 952(a), 963 and 18 U.S.C. § 2.

[2]Gore's share in the proceeds of the dope, which was later estimated at a value of $7,000,000 was to be $500,000 less expenses.

At the time the initial arrangements were being discussed between Gore and D'Antignac, all of Gore's boats, with the possible exception of one old shrimp boat, were in the Gulf of Mexico, apparently fishing. The two met in Fort Myers, Florida, to finalize their plans and to ready the Little Hornet for the trip to South America. It was at this time that Gore first met the other defendants, all of whom allegedly assisted in securing supplies and loading them on the Little Hornet for the trip.[3] Although Gore's ability to recall the initial encounters with the other defendants is somewhat disputed by them, it is clear that Gore did identify them as the ones who were in Fort Myers during the final days of preparation.

All plans having been finalized, the Little Hornet departed for Colombia sometime in the latter part of May 1978. During the time just prior to her departure, and then continuously thereafter, Gore and D'Antignac kept in constant contact with each other using a rudimentary telephone code. According to the plan, Gore's only remaining duty was to be ready to pilot the boat into Kittles' Dock upon her return.

The Little Hornet returned from Colombia, her holds laden with marijuana, and on June 8, she was approximately 20-30 miles seaward of Mayport, Florida. That evening, Gore and several other persons boarded the M/V Miss Shantell and headed out to meet the Little Hornet.[4] The rendezvous was at approximately 12 P.M. the next

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[3]The government introduced into evidence numerous receipts for fuel, supplies, rigging, ice and, in particular, a long range navigational device known as a Loran.

[4]The M/V Miss Shantell was owned by Leonard Skinner, who, along with his son Richard and daughter Cheryl, accompanied Gore on the run out to the Little Hornet. The Skinners were all granted immunity in exchange for Richard's testimony.

day, June 9, and after some brief discussion between Gore and the three crew members of the Little Hornet, Thornton, Cahill and Knight, both vessels headed back toward Sapelo Sound, just off the Georgia coast.

Once they all reached the Sound, Gore boarded the Little Hornet, as planned, to pilot her through the Intercoastal Waterway to Kittles' Dock. While en route, a smaller boat carrying at least two persons pulled up to her stern and defendant Welch boarded the Little Hornet. Shortly thereafter, around 11 P.M., Gore guided her in to the dock, his task completed.

Defendant D'Antignac now appeared at the dock and all five defendants prepared to unload their cargo. They strung up some ligths to assist them. However, when the truck into which the marijuana would be loaded ran into the utility pole and knocked out all the lights and power, the defendants had to alter their plans. D'Antignac phoned Gore and told him the boat would be leaving Kittles' Dock. The Little Hornet thus began her fateful journey back out to the Intercoastal Waterway, her belly still laden with the cargo of marijuana.

On the evening of June 9, around midnight, Customs Patrol Officer Duane Swigert and some county deputies were at Brannen's Dock in Belleville, Georgia, awaiting the return of some officer investigating an unrelated matter. Looking over the area through his binoculars, Officer Swigert noticed a light atop the mast of a vessel out in the Intercoastal Waterway, some four miles away. He watched the movements of the vessel for approximately one hour; the vessel continuously moved north and then south, changing its course between the lighted channel its course markers several times before finally heading in toward the Valona dock area. These erratic movements, coupled with the late hour, aroused his suspicion. He decided to in-

vestigate, so he and his fellow officers drove the five miles down the road to the Valona dock area, losing sight of the mastlight at several points along the way.

Upon arriving, Officer Swigert and his men turned off their car lights and headed into the dock area. The Little Hornet, with her name clearly appearing on her port and starboard bow, was pulling into the dock. Recalling that he had received a memorandum from his office indicating that Gore's boats, including the Little Hornet, were suspected of being involved in smuggling contraband, and observing the arrival of one of Gore's shrimp boats, coupled with the fact that to his knowledge the coastal waters were closed for shrimping, Officer Swigert's suspicions increased. He therefore decided to investigate further after the boat was docked.

After the Little Hornet was secured to the dock, Officer Swigert approached the vessel, showed his credential to the occupant and announced he was coming aboard, although he did not have his service revolver drawn. Defendant Cahill immediately stepped back, raised his hands in disbelief and Officer Swigert boarded. He took one step to the doorway of the pilothouse where he saw defendant Thornton, the other remaining crew member. More importantly, however, he saw a large, partially opened bale right in front of his feet. Through the opening, Officer Swigert had within his plain view a quantity of a green leafy substance. He bent down and took a handful to inspect it and, after smelling it, determined it to be marijuana. He then drew his revolver and arrested Thornton. Cahill was brought in by a deputy and he too was arrested. The officers conducted and on-the-spot search of the cargo hold, which revealed the 28,310 pounds of marijuana.

When the Little Hornet and defendants Cahill and Thornton were secured, Officer Swigert and Deputy Ray Proudfoot left the boat and dock area to summon more police and set up roadblocks. As they pulled away, a Ford Econoline van carrying defendants D'Antignac, Welch and Knight approached and signaled a left turn into the dock area, which was approximately 100 yards from the roadway. Officer Swigert's suspicions, based on his experience, told him that someone would be arriving to unload the marijuana so he stopped the van right after it completed the turn. He decided to question the three individuals to see if they had come to pick up the marijuana so he asked them to step out of the van. Questioning as to their identity and place of residence ensued but the responses were evasive and uninformative. Deputy Proudfoot identified the driver as defendant D'Antignac. Officer Swigert noticed a gun in a shoulder holster on the suspect later identified as defendant Knight and he therefore instructed Deputy Proudfoot to remove it. The third occupant was later identified as defendant Welch. Officer Swigert immediately arrested them for investigation as suspects in connection with the marijuana found on board the Little Hornet.

The five defendants were indicted by the grand jury on four counts arising out of the marijuana importation venture. Gore was named a co-conspirator but was unindicted in exchange for his testimony about the scheme. The defendants moved to suppress the marijuana, alleging an unlawful seizure and subsequent search of the Little Hornet. The motion was denied and the case was tried to a jury. All five defendants were convicted on all counts and each properly perfected his appeal.

On appeal, defendants argue four main points of error, each of which they contend warrants reversal of their con-

victions. First, the district court erred in denying defendants' motion to suppress the marijuana. Second, the district court erred in overruling defendants' objection to the testimony of unindicted co-conspirator Gore on the grounds that it was the product of undisclosed promises made to him by the government. Third, the district court erred in failing to require full compliance with defendants' discovery requests pertaining to exculpatory material. Last, the district court erred in denying defendants' motion to dismiss the indictment based upon Sixth Amendment and Jury Selection and Service Act challeges to the grand and petit jury arrays. Finding no reversible error, we affirm the convictions of all five defendants.

Initially we note that none of the parties has briefed or argued the standing of defendants Knight, Welch and D'antignac to challenge the seizure and search of the Little Hornet. Limited as we are by Article III to adjudicating cases or controversies arising under either the Constitution or federal law, we must inquire whether any of those defendant's Fourt Amendment rights were violated such that they have standing to challenge the search and seizure. The old rule of automatic standing in *Jones v. United States,* 362 U.S. 257, 80 S.Ct. 725, 4 L.Ed.2d 697 (1960), which was narrowed by *Brown v. United States,* 411 U.S. 223, 93 S.Ct. 1565, 36 L.Ed.2d 208 (1973) (possession of the evidence must be *at the time* of the contested search), may not enjoy its original vitality. The focus has shifted to a singular analysis of the substantive Fourth Amendment rights of the defendant rather than a bifurcated examination in which standing is treated separately. *Rakas v. Illinois,* 439 U.S. 128, 99 S.Ct. 421, 58 L.Ed.2d 387 (1978). This in turn has centered on the defendant's reasonable expectation of privacy in the premises searched. *Rakas, supra.* Since we have serious questions about the expectation of privacy that Knight,

Welch and D'Antignac would have in the pilothouse of the Little Hornet, the survival of the rule of automatic standing is critical. *But see United States v. Whitaker,* 592 F.2d 826, 828 n.2 (5th Cir.), *cert. denied,* 444 U.S. 950, 100 S.Ct. 422, 62 L.Ed.2d 320 (1979).

[1] The Supreme Court in *Rakas* has clearly left open the question of the continued viability of automatic standing, in light of its decision in *Brown v. United States, supra,* and *Simmons v. United States,* 390 U.S. 377, 88 S.Ct. at 426 n.4, 58 L.Ed.2d at 396 n.4. We also leave that question for another day. Suffice it to say that since possesion of the marijuana was an essential element of Count II, 21 U.S.C. § 841(a)(1), defendants Knight, Welch and D'Antignac have standing under current Fourth Amendment exegesis to challenge the search and seizure of the Little Hornet.

[2] The next question to be answered is the constitutionality of the seizure and subsequent search of the Little Hornet. It is clear that customs officers are clothed with the statutory authority to

> go on board of any vessel or vehicle at any place in the United States or within the customs waters or, as he may be authorized, within a customs-enforcement area established under sections 1701 and 1703-1711 of this title, or at any other authorized place, without as well as within his district, and examine, inspect, and search the vessel or vehicle and every part hterof and any person, trunck, package, or cargo on board, and to this end may hail and stop such vessel or vehicle, and use all necessary force to compel compliance.

19 U.S.C. § 1581(a). Although couched in very broad language, the statute is, of course, circumscribed by the

reasonableness requirement of the Fourth Amendment.[5] United States v. Serrano, 607 F.2d 1145, 1147 (5th Cir.), *cert. denied,* ____ U.S. ____, 100 S.Ct. 1655, 64 L.Ed.2d 241 (198); *United States v. Freeman,* 579 F.2d 942, 945 (5th Cir. 1978).

The Fifth Circuit in recent years has been inundated with cases presenting Fourth Amendment challenges to boat stops and searches conducted by either Coast Guard or Customs officials. *E. g., United States v. Serrano, supra; United States v. Castro,* 596 F.2d 674 (5th Cir.), *cert. denied,* 444 U.S. 963, 100 S.Ct. 448, 62 L.Ed.2d 375 (1979); *United States v. Whitmire,* 595 F.2d 1303 (5th Cir.), *cert. denied,* ____ U.S. ____, 100 S.Ct. 3048, 64 L.Ed.2d ____ (1980); *United States v. Whitaker,* 592 F.2d 826 (5th Cir.), *cert. denied,* 444 U.S. 950, 100 S.Ct. 422, 62 L.Ed.2d 320 (1979); *United States v. Freeman, supra; United States v. Warren,* 578 F.2d 1058 (5th Cir. 1978) (en banc); *United States v. Odom,* 526 F.2d 339 (5th Cir. 1976). Since these cases involve many conflicting variables regarding the vessels' registry, geographical location at the time of the initial sighting, geographical location at the time of the stop, and the standard of suspicion required to validate the stops, the state of the law in this circuit was unclear.

This court, sitting en banc, recently decided the case of *United States v. Williams,* 617 F.2d 1063 (5th Cir. 1980). Williams involved the stop and search of a foreign vessel

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[5]The Fourth Amendment to the United States Constitution guarantees that:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons of things to be seized.

on the high seas[6] pursuant to 14 U.S.C. § 89(a). The court found constitutinal the plenary statutory authority of the Coast Guard to *seize* a foreign vessel in international waters if there was reasonable cause to suspect that the vessel was being used to smuggle contraband into the United States. *United States v. Williams, supra,* 617 F.2d at 1075-1084. The court also held that reasonable suspicion, rather than probable cause, was the appropriate Fourth Amendment standard by which to judge the lawfulness of § 89(a) searches of the private areas of the vessel's holds conducted for the purpose of discovering contraband. *Id.* at 1087-1088. More importantly, although *Williams* did not purport to define the Fourth Amendment standards for customs searches, *see id.* at 1088 n.30, ("[o]ur analysis does not imply that the reasonable suspicion test would also govern a *customs* search of a vessel within the 12-mile limit."), it clearly negated any suggestion that the Fourth Amendment *mandates* a probable cause and/or warrant requirement to customs searches. *Id.* We therefore conclude that whatever *Williams* does to the "muddled state of our precedent," *id.* at 1071, it does not affect the standard established in *United States v. Serrano, supra,* governing customs seizures of vessels on inland waters.

[3] We have noted the broad statutory grant of authority in 19 U.S.C. § 1581(a); the constitutionality of the board-

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[6]As was observed by the full court in *United States v. Warren,* 578 F.2d 1058, 1064 n.4 (5th Cir. 1978) (en banc), the "12-mile limit includes the territorial sea, which extends to three miles from the coast, and the contiguous zone, which extends from three to 12 miles from the coast." The term high seas refers to the waters "seaward of the territorial sea and thus encompass[ing] the contiguous zone." *Id.* The area of the high seas beyond the 12-mile limit is what the *Williams* court referred to as international waters. *United States v. Williams,* 617 F.2d 1063, 1073 (5th Cir. 1980).

The Little Hornet was seized in inland waters, not on the high seas.

ing of the Little Hornet turns, however, on one of the following two principles: 1) a border search; or 2) a limited investigatory stop based upon a reasonable suspicion of law violation. *See United States v. Serrano, supra; United States v. Whitmire, supra.* Although the Little Hornet was initially sighted late at night and was shrimp boat moving about at a time when coastal shrimping was not in season, we do not feel those facts support a finding that she had crossed the three-mile line. Moreover, we are not certain that a mere reasonable suspicion would suffice. *See United States v. Whitmire, supra,* 595 F.2d at 1307-08 & n.2. We therefore examine the second above stated principle.

Serrano clearly holds that

> Customs officer may make an investigatory stop of a vessel on inland waters adjacent to the open Gulf of Mexico under 19 U.S.C.A. § 1581(a) on facts which justify a reasonable suspicion of illegal activity. The evidence need not support suspicion of a border crossing, but only of the presence of contraband.

United States v. Serrano, supra, 607 F.2d at 1148 (citation omitted). *See United States v. Castro, supra,* 596 F.2d at 676. We feel that *Serrano* controls this case. The facts known to Officer Swigert included the following: He observed the erratic movements of the vessel in the Intercoastal Waterway late at night for approximately one hour; there were no other vessels in the vicinity either before, during or after the sighting and subsequent boarding; he went to investigate and found a shrimp boat bearing the name Little Hornet pulling into the dock; to his knowledge coastal shrimping was out of season; he had received prior information that the Little Hornet was suspected by the United States Customs Service of being involved in smuggling contraband; he had not seen her in

the Valona dock area at all during the spring of 1978. Based on the above facts, the district court found that a reasonable suspicion of law violation existed such the Officer Swigert could make an investigatory boarding to ascertain the identity of those aboard. That finding was not error. The boarding of the Little Hornet was therefore reasonable under Fourth Amendment scrutiny.

[4] Immediately upon stepping aboard the Little Hornet, Officer Swigert was at the doorway to the pilothouse. He then had within his plain view, in front of his feet, a partially opened bale of some green leafy substance. He suspected it to be marijuana, so he took a handful from the exposed portion and smelled and examined it. This brief examination confirmed his suspicion that the substance was marijuana and at that point, there was probable cause to search the hold of the Little Hornet for the purpose of discovering contraband. *United States v. Serrano, supra,* 607 F.2d at 1148. Moreover, there clearly existed the exigent circumstances that defendants contend were absent. The court in *Whitmire,* where the vessel was docked and the crew ashore, noted that "[i]f exigent circumstances be required, they were present as well." *United States v. Whitmire, supra,* 595 F.2d at 1316. The inherent mobility of a vessel and the attendant possibility of flight or disposal of evidence certainly amount to exigent circumstances. *See United States v. Monroy,* 614 F.2d 61, 64 (5th Cir. 1980); *United States v. Cortes,* 588 F.2d 106, 110-11 (5th Cir. 1979); *United States v. Cadena,* 588 F.2d 100, 101-02 (5th Cir. 1979) (on petition for rehearing); *United States v. Freeman, supra,* 579 F.2d at 947-48. Since we have found that the initial boarding and subsequent search of the Little Hornet was statutorily and constitutionally valid, the district court correctly denied the motion to suppress the marijuana as to defendants Thornton and Cahill.

[5] Defendants Welch, Knight and D'Antignac also challenge the legality of the stop of the van near the scene of the seizure of the Little Hornet. Having merely exited from the public highway into the long driveway leading to the dock, the defendants claim there was no lawful reason for the stop. They argue that *Delaware v. Prouse,* 440 U.S. 648, 99 S.Ct. 1391, 59 L.Ed.2d 660 (1979), invalidates random stops to check drivers' licenses and auto registration absent articulable facts sufficient to create a resaonable suspicion concerning the driver or the vehicle's registration. *Prouse* has no application in this case. Officer Swigert did not "randomly" stop the defendants' van. He specifically stopped the van solely because it had turned into the driveway area where he had just seized a vessel loaded with marijuana, and he reasonably believed the defendants were arriving at this dock to retrieve the contraband. There were no other people around at that late hour and he merely decided to investigate the newly arrived vehicle prior to his departure to secure back-up support. The minimal intrusion of the brief stop here, occasioned by Officer Swigert's suspicions that these defendants were arriving to retrieve contraban, satisfies the Fourth Amendment requirement of reasonableness regarding investigatory stops. *See United States v. Brignoni-Ponce,* 422 U.S. 873, 878-81, 95 S.Ct. 2574, 2578-2580, 45 L.Ed.2d 607, 614-616 (1975).

After the three occupants got out of the van, they were immediately questioned. D'Antignac, the driver, gave evasive answers as to where he resided and states that they had come to investigate the lights and commotion. there were absolutely no lights and no commotion whatsoever. After Officer Swigert noticed a gun in a shoulder holster on defendant Knight, he instructed Deputy Proudfoot to remove it as a precautionary measure for the officers' safety. The defendants gave no more satisfactory explanations

to the officers' inquiries and at this point, the combination of all the circumstances surrounding the Little Hornet and the van gave Officer Swigert probable cause to arrest them for suspicion of involvement in the Little Hornet incident.

We therefore conclude that the investigatory boarding and search of the Little Hornet, followed by the investigatory stop and subsequent arrest of the occupants of the van, was lawful; the suppression motion was thus correctly denied as to all defendants.

[6] Defendants argue reversible error in the district court's overruling of their objection to the testimony of unindicted co-conspirator Gore, whose testimony the government candidly admitted was critical in securing the convictions. They argue that Gore clearly perjured himself at either the *James* hearing[7] or at the trial itself. They base their attack on the prosecutor's question to Gore implying that Gore would be prosecuted if he perjured himself, coupled with the fact that Gore conferred with the prosecutor over a noon hour recess. Since his testimony has changed somewhat after lunch, they contend that a promise was given and such an undisclosed promise warrants

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[7] *See United States v. James*, 590 F.2d 575 (5th Cir.) (en banc), *cert. denied*, 442 U.S. 917, 99 S.Ct. 2836, 61 L.Ed.2d 283 (1979). Under *James*, the question of the admissibility of a co-conspirator hearsay statement offered in evidence against the defendant is a decision to be made by the judge. *James* anticipates an independent showing of admissibility by at least a preponderance of the evidence that 1) there existed a conspiracy, 2) the co-conspirator and the defendant against whom the co-conspirator and the defendant against whom the co-conspirator hearsay statement is offered were members of the conspiracy, and 3) the statement was made during the course of and in furtherance of the conspiracy. *Id.* at 582-83.

The trial of this case occurred prior to the effective date of *James*, and the judge conducted a separate hearing outside the presence of the jury.

reversal the reasoning of *Giglio v. United States,* 405 U.S. 150, 92 S.Ct. 763, 31 L.Ed.2d 104 (1972). We disagree.

First, it is not at all clear that Gore perjured himself. His entire line of testimony was by way of recollection and "to the best of my ability." At the *James* hearing, he could not positively identify everyone by sight alone. All of the defendants were identified at trial, however, by sight or voice as having been in Fort Myers, Florida, or on the Little Hornet itself, aiding in the preparation of the boat. The purpose of the noon conference was merely to inform Gore that he could testify regarding a person's identification through means other than sight, and if he could identify any of the defendats by voice, then to so testify. This testimony at trial was simply more positive, not contradictory. Secondly, *Giglio* involved a case where the jury was unaware of *any* promise of immunity. Here the jury knew of the many promises made to Gore;[8] it was merely unaware of one arguably implied promise, if indeed there was one. Moreover, the underlying focus here is credibility. The jury was properly charged on credibility[9] and we

[8]The deal included the release of an $11,500,000 tax lien, return of the Little Hornet, immunity for the Little Hornet smuggling scheme, and immunity for all events arising out of an incident involving another one of Gore's boats, the M/V Stonefield Lady, which the Coast Guard found mysteriously sunken in the Gulfstream around June 26, 1978.

[9]The jury instruction included the following:

> You are the sole judges of the credibility or believability of each witness and the weight to be given to his testimony. In weighing the testimony of a witness, you should consider his relationship to the Government or the Defendant; his interest, if any, in the outcome of the case; his manner of testifying; his opportunity to observe or acquire knowledge concerning the facts about which he testified; and the extent to which he has been supported or contradicted by other credible evidence. You may, in short, accept or reject the testimony of any witness in whole or in part.

do not believe that defendants' alleged error was material to the outcome. *See Giglio, supra.* Defendants' argument is without merit.

[7] Defendants argue reversible error in the district court's failure to require full compliance with discovery requests pertaining to exculpatory material. We note that defendants' erroneous insistence on the importance of the M/V Stonefield Lady incident[10] in this case only serves to

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> The testimony of an alleged accomplice, and the testimony of one who provides evidence against a Defendant as an informer for pay or for immunity from punishment or for personal advantage or vindication, must always be examined and weighed by the Jury with greater care and caution than the testimony of ordinary witnesses.
>
> You, the Jury, must decide whether the witness' testimony has been affected by any of those circumstances, or by his interest in the outcome of the case, or by prejudice against the Defendant, or by the benefits that he has received either financially, or as a result of being immunized from prosecution; and, if you determine that the testimony of such a witness was affected by any one or more of those factors, you should keep in mind that such testimony is always to be received with caution and weighed with great care.
>
> You should never convict any Defendant upon the unsupported testimony of such a witness, unless you believe that testimony beyond a reasonable doubt.
>
> A witness may be discredited or impeached by contradictory evidence, or by a showing that he testified falsely concerning a material matter, or by evidence that at some other time a witness has said or done something, or has failed to say or do something, which is inconsistent with the witness' present testimony.
>
> If you believe that any witness has been so impeached then it is your exclusive province to give the testimony of that witness such credibiiity or weight, if any, as you may think it deserves.

[10] *See* note 8 supra.

weaken their claim of reversible error. It is the Little Hornet incident that is at issue here. Analyzing defendants' argument for its content, the underlying substance merely calls into question the credibility of Gore, a point we have already addressed.

In support of their argument, defendants rely on *Brady v. Maryland,* 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963). *Brady's* proposition is that the withholding or suppression by the prosecution of evidence material to guilt or punishment is violative of due process. *Id.* at 87-88, 83 S.Ct. at 1196-97, 10 L.Ed.2d at 218-19. *See also Giglio v. United States, supra, 405 U.S. at 154, 92 S.Ct. at 766, 31 L.Ed.2d at 108 (a finding of materiality of the evidence is required under Brady).* The recent case of *United States v. Agurs,* 427 U.S. 97, 96 S.Ct. 2392, 49 L.Ed.2d 342 (1976), provides the standard of materiality of undisclosed evidence. The omitted evidence must create a reasonable doubt of guilt that did not otherwise exist in order to justify a new trial. *Id.* at 112-13, 96 S.Ct. at 354-55. Neither *Giglio* nor *Brady* provides support for defendants since their discovery requests were tailored for impeachment purposes that could be described as cumulative at best. Moreover, the overwhelming evidence of guilt in this case belies any notion that the discovery material might have created a reasonable doubt. *See Agurs, supra.*

Assuming, arguendo, that the discovery requests included evidence material to guilt or punishment, we would nevertheless uphold the district court on this matter. The government complied with court orders for production of documents to the extent of over 340 pages in the record. Defendants simply were not satisfied with the quantum of arguably exculpatory, and they now contend, with no citation of authority, that this was insufficient. The district

court did not err in denying defendants' motion to dismiss or, alternatively, in not ordering more discovery.[11]

[8] Defendants' last argument is that the district court erred in denying their motion to dismiss the indictment based upon a challenge to the grand and petit jury arrays. This same challenge in the same judicial district was considered and discussed at length in *United States v. Maskeny,* 609 F.2d 183 (5th Cir.), *cert. denied,* ____ U.S. ____, 100 S.Ct. 3010, 64 L.Ed.2d ____ (1980). There the court found no constitutional or statutory infirmity with the process of grand and petit jury selection that would have warranted reversal of the convictions. We do not feel there is a legally significant distinction between the two cases and, accordingly, we reject defendants' juror selection challenges under the Sixth Amendment and the Jury Selection and Service Act, 28 U.S.C. §§ 1861-1869 for the same reasons set out in *United States v. Maskeny, supra,* 609 F.2d at 189-94. *See also United States v. Butler,* 611 F.2d 1066, 1069-70 (5th Cir. 1980).

In summary, we reiterate that the case of *United States v. Serrano, supra,* is controlling on the issue of the constitutionality of the seizure and subsequent search of the Little Hornet. Having reconsidered fully the various challenges raised by defendants, we find that the district court did not err in denying the motion to suppress the marijuana. Furthermore, defendants' other arguments are meritless for the reasons above discussed. The convictions are therefore affirmed.

AFFIRMED.

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[11]In its brief, the government states that it has supplied FBI materials to defendants right up to November 28, 1979, as they became available. The government contended earlier that some of the matter sought simply did not exist.

THOMAS A. CLARK, Circuit Judge, concurring:

I concur that the district court was correct in denying the motion to suppress the seized marijuana.

However, since I get there by a little different route, I wish to express my reasons. The majority opinion holds that the facts are sufficient to support a limited investigatory stop. I think the facts are too thin. At slip op. page 8452, at page ____ the opinion states "the constitutionality of the boarding of the Little Hornet turns, however, on one of the following two principles: 1) a border search; or 2) a limited investigatory stop based upon a reasonable suspicion of law violations." I do not think these principles have to be considered disjunctively.

Most people's mental processes are not compartmentalized and judges fall into the category of "most people." Officer Swigert considered the observations attributed to him on slip op. pages 8452-8453 on page ____ of the opinion, but he also considered that this was a shrimp boat coming into a dock on the Atlantic from points unknown, when coastal shrimping was not in season. While the majority opinion says that this fact alone would not support a border search, with which I agree, I think this fact, when coupled with the facts relied upon by the majority, gave the officers sufficient grounds to board the vessel.

The Supreme Court at its lat term decided *U.S. v. Mendenhall,* ____ U.S. ____, 100 S.Ct. 1870, 64 L.Ed.2d ____, in which it approved the combining of a series of totally innocent facts to constitute a drug courier profile. Based upon such a profile, the court sustained an investigatory stop. While the present case does not involve the drug courier profile, it does suggest use of the common admonition that courts "may consider the totality of circumstances" in determining if a given set of facts add to a

reasonable conclusion. Facts too narrow to support either an investigatory stop or a border search, when combined can support the stop.

Consequently, it is my view that here it was proper for the officer to consider the nature of the vessel, that it was not the shrimping season, and that a border crossing was certainly possible, and perhaps even probable. Based upon considering these added facts to the facts relied upon by the majority opinion, I have no problem with concurring.

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